No. 92-1312

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

LIBERTY MUTUAL INSURANCE COMPANY and
THE TRAVELERS INDEMNITY COMPANY OF ILLINOIS,
Petitioners,

v.

ELJER MANUFACTURING, INC., f/k/a
HOUSEHOLD MANUFACTURING, INC.,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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RULE 29.1 STATEMENT

The respondent in this proceeding is Eljer Manufacturing, Inc. The parent corporation of Eljer Manufacturing, Inc. is Eljer Industries, Inc. Eljer Manufacturing, Inc., has no subsidiaries that are not wholly owned.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Eljer Manufacturing, Inc. ("Eljer"), hereby opposes the petition for a writ of certiorari filed by Liberty Mutual Insurance Company ("Liberty") and The Travelers Indemnity Company of Illinois ("Travelers") in this case.

STATEMENT

This is a diversity case involving the interpretation of an insurance contract under Illinois and New York law. No question of federal law is presented, nor are the Circuits in conflict with respect to the issue of Illinois and New York law decided by the court of appeals. The Seventh Circuit applied settled principles of contract construction to the particular contract at issue to arrive at

a result consistent with the contract language and relevant precedent in both Illinois and New York.

Petitioners attempt to concoct "important federal procedural issues" by asserting that the court of appeals improperly engaged in *de novo* factfinding in violation of Federal Rules of Civil Procedure 52 and 56. As even a cursory review of the Seventh Circuit's opinion will demonstrate, however, no appellate factfinding occurred. The court of appeals determined as a legal matter what the term "physical injury to tangible property," as used in a standard form insurance contract, means under Illinois and New York law. Nothing in the Seventh Circuit's decision remotely implicates Rules 52 and 56, or any other principle of federal procedural or substantive law. Accordingly, certiorari should be denied.

1. *Proceedings in the District Court.* This case involved a dispute over the meaning of a contract. The contract is the 1973 version of the Comprehensive General Liability ("CGL") policy. (Petn. A1-2.) The issue in dispute was whether "property damage," as defined in the policy, occurred at the time that a defective component was incorporated into a structure or only later, when the defect manifested itself through the failure of the component. (*Id.* A2-A5.) The issue was significant to the parties because the insured, Eljer, had maintained substantial liability insurance during the years in which its allegedly defective plumbing systems were installed in residences, but had been unable to obtain coverage in later years, once the systems had begun to fail. (Petn. A4-5, A8, A35.)

This dispute was presented to the district court for resolution on cross-motions for summary judgment. As the district court noted in its decision, the parties agreed that the only issue was a question of contract construction, and that no material facts were in dispute. (Petn. A29.) The district court resolved that question in part by focusing upon the difference between the definition of

"property damage" in the 1973 CGL form policy, which defined it as "physical injury to tangible property," and the definition in the prior, 1966 form policy, which defined it simply as "injury to tangible property." (*See* Petn. 5-7, A50-52.) The district court concluded that the addition of the word "physical" to the definition in 1973 had narrowed the CGL policy's definition of property damage in a way that precluded the installation-based coverage for which Eljer argued. (*Id.*)

2. *Proceedings in the Court of Appeals.* The court of appeals also focused upon the differences between the 1966 and 1973 form policies. It noted that, under the 1966 form CGL policy, coverage was clearly available for incorporation of a defective component into another structure. (Petn. A9-10, A15-17.) The key question, therefore, was whether the 1973 change in the form policy's definition of "property damage" had eliminated that coverage. By carefully examining the policy language in its proper context, the court concluded that the pre-existing installation-based coverage was carried forward in the 1973 form policy. The court's construction of the policy language was confirmed because the contrary construction would render the coverage of the CGL policy largely illusory in an important class of cases. (Petn. A8-9.)

Judge Cudahy dissented because he believed decisions of the Illinois state courts pointed to a contrary result. He noted, however, that he "might well agree" with the majority's analysis, if he could agree that the court was "writing on a clean slate." (Petn. A26-27.) Judge Cudahy expressed no concern with respect to any improper "factfinding" by the majority.

The court of appeals denied Liberty's and Travelers' petitions for rehearing; no active Judge, including Judge Cudahy, requested a vote on their suggestions for rehearing *en banc.* (Petn. A64-65.)

REASONS FOR DENYING THE PETITION

The essential premise of the petition is that the Seventh Circuit resolved *de novo* disputed factual issues—specifically, the intent of the drafters of the 1973 form CGL policy and the largely illusory coverage the form policy would provide under the construction adopted by the district court. (Petn. 2-3.) However, the court of appeals engaged in no such "factfinding"; it simply applied settled principles of contract construction to the contract language before it. The petition is nothing more than an attempt to contrive a federal procedural question after petitioners lost on the state-law issue resolved by the court below.

1. Under the law of Illinois and New York, the meaning of terms in a written contract is a question of law for resolution by the court. *See, e.g., Vigilante* v. *National Bank of Austin*, 106 Ill. App. 3d 820, 823, 436 N.E.2d 652, 655 (1982); *805 Third Ave. Co.* v. *M.W. Realty Associates*, 58 N.Y.2d 447, 451, 448 N.E.2d 445, 447 (1983). The central issue in this case was what meaning should be ascribed to the contract term "physical injury to tangible property." The Seventh Circuit properly determined the meaning of that contract term by considering the specific language itself, the structure and purpose of the policy as a whole, and the context in which the contract language at issue appeared.

a. The district court, the parties, and the Seventh Circuit were all in agreement that "property damage" as defined in the 1966 version of the form CGL policy—"injury to tangible property"—encompassed the installation of a defective component in another structure. (Petn. A9-10, A15-17, A50-52; Liberty Br. 16, 30-32; Travelers Br. 5-6, 10-13.) The Illinois and New York state courts had squarely decided the question (Petn. A15-17), and other courts and commentators were in agreement. *See, e.g.*, Arness & Eliason, *Insurance Coverage for "Property Damage" in Asbestos and Other*

Toxic Tort Cases, 72 Va. L. Rev. 943, 953-57 (1986), and cased cited therein. The only issue presented in this case, therefore, was whether the 1973 change in definition—the addition of "physical" to "injury to tangible property"—required a different result under Illinois and New York law.

To resolve this legal issue, the Seventh Circuit quite properly analyzed the changes in the CGL policy in the context in which they were made. Petitioners' assertions to the contrary notwithstanding, the Court reviewed published materials regarding the drafting history of the CGL form policy, not to resolve a factual issue concerning the parties' subjective "intent," but to understand the meaning and evolution of the policy language at issue and, in particular, the reason for the 1973 change. In doing so, the Seventh Circuit was following the lead of state courts, which routinely refer to such materials when interpreting language used in form insurance contracts. *See, e.g., USF&G Co.* v. *Specialty Coatings Co.*, 180 Ill. App. 3d 378, 385-88, 535 N.E.2d 1071, 1076-78, *appeal denied*, 127 Ill. 2d 643, 545 N.E.2d 133 (1989); *Continental Cas. Co.* v. *Rapid-American Corp.*, 1993 N.Y. Lexis 81, at *5-6 (N.Y. Ct. App., Feb. 11, 1993).[1]

b. That this analysis contravenes neither state law nor Rules 52 and 56 is underscored by petitioners' own argu-

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[1] The Seventh Circuit also was using substantially the same analysis that was used in the cases petitioners cite on the merits of the contract interpretation issue. (*See* Petn. 20-22.) In those cases, the appellate courts discerned the reason for, or "intent" underlying, the 1973 policy changes as a matter of law, without trial court "findings" on the subject. *See, e.g., Hartford Acci. & Indem. Co.* v. *Pacific Mut. Life Ins. Co.*, 861 F.2d 250, 254 (10th Cir. 1988); *American Home Assur. Co.* v. *Libbey-Owens-Ford Co.*, 786 F.2d 22, 25 (1st Cir. 1986). Like the Seventh Circuit, these courts of appeals based their analysis of the 1973 language in part on secondary sources regarding the drafting history, including some of the same articles cited by petitioners.

ments in the court of appeals. In their briefs below, Liberty and Travelers cited "secondary sources" and "historical materials" to support their own proposed construction of the contract. (Liberty Br. 31-32; Travelers Br. 31-33.) It was only when the panel declined to accept their construction that petitioners decided that the drafting history of the CGL policy presented factual issues that should not have been considered at all. Indeed, even now petitioners seek to have their cake and eat it too by arguing, on the one hand, that the Seventh Circuit's consideration of published materials concerning the drafting history contravened Rules 52 and 56 and, on the other hand, that the court erred because it "wholly ignored the commentators that were cited by the insurers." (Petn. 18.)

c. Petitioners also attack the Seventh Circuit's reference to the largely illusory coverage that would result from the district court's construction of the policy as another improper factual finding. Here again, petitioners are mistaken. Under Illinois and New York law, courts are required to construe contracts in a way that will not produce futile or absurd results. *Nassau Chapter Civil Service Employees Assn.* v. *County of Nassau*, 77 A.D.2d 563, 564, 430 N.Y.S.2d 98, 100 (App. Div. 1980), *aff'd mem.*, 54 N.Y.2d 925, 429 N.E.2d 831 (1981); *Reserve Ins. Co.* v. *General Ins. Co.*, 77 Ill. App. 3d 272, 280, 395 N.E.2d 933, 938 (1979). This principle is of particular significance in construing insurance policies. *See, e.g., Sears, Roebuck & Co.* v. *Reliance Ins. Co.*, 654 F.2d 494, 495, 498-99, 501 (7th Cir. 1981); *Thomas J. Lipton, Inc.* v. *Liberty Mut. Ins. Co.*, 34 N.Y.2d 356, 361, 314 N.E.2d 37, 39 (1974). Application of this principle does not call for determinations of fact concerning the specific circumstances of the parties before the court, but rather requires interpretation of contract language in light of the general purposes of such contracts. In this case, as in *Hancock Laboratories, Inc.* v. *Admiral Ins. Co.*, 777 F.2d

520, 525 (9th Cir. 1985), and *Keene Corp.* v. *Ins. Co. of North America*, 667 F.2d 1034, 1045-47 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1109 (1982), the court of appeals properly considered as a matter of law two competing interpretations of an insurance policy and rejected the one that, if accepted, could result in illusory coverage in many cases.

Again, petitioners' concern with the "factual" nature of this analysis is newly minted. In their briefs below, petitioners argued, not that consideration of "illusory" coverage would be improper or raise disputed issues of fact, but that Eljer's argument was wrong on the merits and that coverage would not be illusory under the district court's construction. (*See* Travelers Br. 34-36; Liberty Br. 26-27.) It was only after the Seventh Circuit rejected their argument, an argument they repeat in this Court (Petn. 16), that it occurred to them that this analysis was "factual."[2]

2. Although they do not suggest that their petition should be granted for this reason, petitioners also assert that, on the merits, the Seventh Circuit's decision is "contrary to almost every other state and federal opinion on the subject." (Petn. 19.) Of course, cases decided under the laws of states other than Illinois and New York, such as the cases cited by petitioners (*id.* 19-22), are irrelevant. The Seventh Circuit analyzed the relevant Illinois and New York authority and interpreted

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[2] Because the issue decided by the court of appeals was not new, having been at the center of the case from the outset, and was not factual, presenting instead a question of contract construction, petitioners' reliance upon *Fountain* v. *Filson*, 336 U.S. 681 (1949), and *Icicle Seafoods, Inc.* v. *Worthington*, 475 U.S. 709 (1986), is unavailing. This is not a case, like *Fountain*, in which an appellate court on its own motion addressed and resolved a separate claim not even presented to the district court. 336 U.S. at 682-83. Nor is it a case, like *Icicle Seafoods*, in which an appellate court identified new factual issues not addressed by the district court and then proceeded to resolve them *de novo*. 475 U.S. at 714.

the policy in accordance with that authority. (Petn. A15-19.) Moreover, in reality, most courts outside Illinois and New York that have considered the question have come to the same conclusion as the Seventh Circuit. (*See* Eljer Br. 43-45; Eljer Reply Br. 27-32.) In any event, a difference of opinion in different states on an issue of state law, even an "important" issue of state law, provides no basis for review in this Court.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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